UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE ANDRÉ BIROTTE JR., U.S. DISTRICT JUDGE

UM CORPORATION, A JAPANESE CORPORATION, PLAINTIFF, vs. TSUBURAYA PRODUCTIONS CO., LTD., A JAPANESE CORPORATION, DEFENDANT. AND RELATED COUNTERCLAIM.	No. CV 15-3764-AB-AJW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, JULY 24, 2017

12:09 P.M.

LOS ANGELES, CALIFORNIA

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LOS ANGELES, CALIFORNIA; MONDAY, JULY 24, 2017

12:09 P.M.

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THE CLERK: Calling CV 15-3764-AB, UM Corporation versus Tsuburaya Productions Co., Ltd.

Counsel, please state your appearances for the record.

MR. WEXLER: Good afternoon, Your Honor. Jeffrey Wexler of Pillsbury on behalf of plaintiff and counter-defendant UM Corporation, counter-defendants Golden Media Group and Tiga Entertainment Company, and with me are Michael Chibib and Timothy Rawson, also of Pillsbury.

THE COURT: Good afternoon.

MR. POSNER: Good afternoon, Your Honor. I am Dan Posner from Quinn Emanuel for the defendant Tsuburaya Productions. I am here with my colleagues, Ryan Goldstein and Zachary Schenkkan.

THE COURT: Good afternoon to you all. I appreciate you hanging with us all morning into the afternoon. Very interesting and fascinating case, to say the least.

I have reviewed the volumes of evidence that's been submitted. I did not issue a tentative in this case. I do have a good number of questions. Forgive me, but I may have you do a little bit of a, for lack of a better term,

ping-ponging where you are up and down. So I figure you have been sitting all morning; so you might as well get some blood flow going.

So let me get to the heart of this here. All right. Let's start. So it's UM Corporation. I have been calling it UM. And I have been calling Tsuburaya -- is that it?

MR. POSNER: That's not bad, Your Honor. Tsuburaya Productions (pronouncing).

THE COURT: Okay. Can I call it TPC? Is that okay?

MR. POSNER: You may.

THE COURT: All right. Great. Let's start with Mr. Posner. We'll start. At least, if I am reading all of this correctly, you signal in your papers, at least, your intent to prove the invalidity of this 1976 Agreement at trial.

So the Court would assume that you would not acquiesce to granting comity on the issue -- or comity to the issue of the document's validity, as was your position, I think, in the motion for judgment on the pleadings stage.

And so my question is what's the authority to support your position that the Court can recognize only portions of the foreign judgment?

MR. POSNER: Well, Your Honor, this is a

1 question -- and you are correct about our position that was
2 litigated on the previous motion to dismiss. We do dispute
3 the validity of the contract.
4 This is a matter of issue preclusion. So that's
5 really the support. Comity is one inquiry. It considers
6 various factors relating to whether the judgment itself is
7 entitled to recognition. The issue preclusion is what gets
8 us to where we are today.
9 As you recall in the previous motion that
10 UM Corporation raised, the primary difference was that this
11 question about the validity of this contract is subject to
12 competing foreign judgments.
13 In fact, the judgments in Thailand have found the
14 document to be a forgery and that the -- Mr. Sompote, who is
15 not here before the Court, was even convicted of criminal
16 violations for having proffered it to the Court.
17 Your Honor, rightly recognized, in our view, that,
18 where there are conflicting foreign judgments on a matter
19 and, in this case, where it was, at least, arguable that the
20 judgments from Thailand are more recent on the issue, there
21 was no basis to apply comity to that portion of the
22 judgment.
23 THE COURT: But then I guess does picking and
24 choosing from the foreign judgment, wouldn't that in some
25 ways undermine the spirit behind the comity doctrine?

MR. POSNER: Well, we don't think so, Your Honor, because one of the considerations of comity, again, is -- one of the recognized factors is whether there are conflicting foreign judgments.

Where there are not, we're not able to come up with a good reason not to follow that judgment from Japan. And here there are a multiple final judgments from Japan -- and I'll offer another reason in a moment on this question -- that are uncontradicted by any other foreign courts that have addressed the issue. The Thailand courts went even further. The Chinese court was largely in accord.

Also, Your Honor, this is a question of the meaning of a contract, which is undisputed is a contract governed by Japanese law.

This issue is more grounded in Japanese law than, we would argue, is the question of the validity of the contract which largely turns on this factual question of whether the signature on the document is valid or invalid.

We understand that we're threading a needle to some extent, but it is supportive, we believe, by the authorities particularly when UM Corporation -- it's a Japanese company. They've admitted that they were formed specifically so that they could be bound by the judgments from Japan. They admit those judgments are final and binding and now they've come to court for relief and, yes,

they wanted to apply comity to the question on the validity, but there were conflicting foreign judgments.

This aspect of the judgment, though -- there is no conflict. It's a question of Japanese law. There is no dispute about what the Courts have held multiple times over, and we believe authority -- the authorities would amply support Your Honor's decision to apply comity and issue preclusion although I will add, if the Court has any concerns about that, we believe we've also amply demonstrated that, being that this is a question of Japanese law, the -- there is no better evidence about what this contract means than the judgments from Japan that have construed the meaning of this contract.

So you have two paths to get to the same result. One would be comity and issue preclusion. Another one would be interpreting this contract under Japanese law in accordance with the way that the Japanese courts themselves have done so on multiple occasions.

THE COURT: Okay. And I appreciate it. And we'll talk more about that in a moment.

Let me switch -- is it Mr. Wexler, if you could? I want to talk for a moment about the 1976 Agreement. I guess the question I have for you is -- tell me how you argue that the breach of the contract claims are not preempted by the Copyright Act because they're brought under

Japanese law, and then you simultaneously argue that the previous Japanese judgments don't allow for issue preclusion and comity because they didn't apply U.S. copyright law. It seems inconsistent.

What's your case law that supports that argument?

MR. WEXLER: First, Your Honor, case cited by TPC in the reply memo -- they cited LaSala versus UBS case on issue of preclusion.

I wanted to let the Court know that there was a Third Circuit opinion, LaSala versus Bordier Et Cie -- my pronunciation of French is probably worst than my pronunciation of Japanese and Thai -- but it's 519 F.3d 121, 139, Third Circuit 2008. And that's a case that went the opposite way on that preemption issue.

And the contract claim would not be preempted under the -- because the term "state" is defined in 17 USC Section 101 to include the District of Columbia and the Commonwealth Puerto Rico and any territories to which the Act is made applicable. That takes care of the preemption issue with regard to the contract claim.

To get back to the copyright claim, we have the issue of the Berne Convention where you have the -- where you have a copyright claim -- you have ownership decided under the laws of the state where there is -- the country where there is a contract.

And under that law -- and if you are going to apply issue preclusion to something that the Japanese court did hear, what the Japanese court did that's undisputed by any court that's addressed the issue and which might be entitled to issue preclusion here -- I don't know how TPC avoids having issue preclusion apply to this -- is in the 2003 appellate court judgment, the appellate court judgment which was not mentioned by Judge Iimura, TPC's expert opinion -- expert on Japanese law -- that opinion said that Sompote, UMC's predecessor, had exclusive exploitation rights to the "Ultraman" works outside of Japan.

And once you have that holding that -- as to the rights that are held under Japanese law, you go under the Berne Convention to the law of the jurisdiction where an infringement is claimed.

Here the UMC's claims in this lawsuit for copyright infringement, of course, arise under the laws of the United States.

And under the Berne Convention, you look at the panoply of rights that were assigned in the 1976 Agreement that we'll eventually be discussing this in a bit, our argument is that all copyright rights were assigned because the word "copyright" was used in the 1976 Agreement.

There is also a more complicated agreement that our expert, Mr. Ejiri, went into, but the simple argument is

it says all copyrights are assigned. Therefore, all copyright rights are assigned. We have the Japanese appellate court saying in an undisputed opinion that the 1976 Agreement which is held valid -- that part is disputed -- the 1976 Agreement which was held valid by the Japanese court, TPC disputes that part of the holding.

But the undisputed part of the holding by the Japanese court of appeal is that exclusive exploitation rights worked -- outside of Japan were conveyed. And once you have those rights conveyed, that's what gets you to the U.S. law applying to the copyright infringement claim.

THE COURT: Let's shift, if we could. Can you talk to me a little bit about what you believe the law, whether it is U.S. or Japanese law, supports your position that Judge Iimura cannot offer expert testimony?

It seems to me that we may have -- we may question why he might do that, but are there any rules that, specifically, exclude the consideration of that testimony?

MR. WEXLER: We tried very hard to find authority talking about this precise issue, and we couldn't. And I think it's just so beyond the pale for what we might imagine happening in U.S. courts that a judge would step down from the bench and be an expert for one side or the other side.

So it's almost more an issue, I think, of the Court's inherent power under the -- to deal with the

circumstances before it.

To the extent we're talking about this motion, to the extent that we're talking about getting before a jury, I think Rule 403 comes into play and the idea of having a judge come in and say, "Well, this is my opinion and here is what I meant by this opinion," is something that's just so prejudicial that it ought not to be allowed.

One example that I will give you -- I didn't point this out in the papers the way we should have. I didn't pick up on it. The Bandai Noncontravention Agreement, Judge Iimura is opining that his court held that that agreement barred any damages claim against TPC.

And if we read the opinion as it's been translated recently by TPC, the -- that theory isn't -- it's clear that no damage claim could be maintained against Bandai in the Japanese court.

And we've argued why it couldn't possibly be that it was because Bandai was a shareholder of TPC because it was a shareholder of TPC at the time of the 1998 Bandai Noncontravention Agreement and the two related agreements, and, therefore, the court could not have believed that those agreements were intended to release those claims against Bandai.

But what I think the court is actually saying there is that the Bandai -- the Noncontravention Agreement

barred claims against Bandai, and, therefore, it barred claims against TPC for its sales to Bandai. I think that's what was meant there.

And if you read that opinion, you can't see anything different, but here we have Judge Iimura coming in and saying, "You know, here is what I -- what's actually meant by this opinion. This opinion says this."

It doesn't actually say this. I am reminded of "Annie Hall" where somebody is talking about Marshall McLuhan and what he thinks about how the -- about Marshall McLuhan's theories, and Woody Allen brings Marshall McLuhan out from behind a curtain and says, "You know, you know nothing about what I say. I am Marshall McLuhan, and here is what I really meant."

And that's kind of what happened here with Judge Iimura. And there has got to be some way I think that his opinions stay out to the extent that he is opining as to things that are not in the actual agreements of court, and, to the extent he is opining about things that are actually in the opinions of the court, who needs him?

The opinions of the court already say that. And to the extent that we try to get him to opine as to things that weren't in the opinions of the court, such as the effect of the other two agreements entered into at the same time as the Bandai Noncontravention Agreement, he wasn't

able to discuss that.

And so he is, basically, as -- presumably, as an ethical matter under the rules of the Japanese courts, he's not able to opine as to what the opinions meant, what Japanese law is beyond what the Japanese courts actually did.

And so I'm not sure exactly what the final basis is, but I sure know that the purpose of the common law and inherent power is to do what -- do justice and do what's right. Something here smells bad, and there ought to be something that can be done to deal with that.

THE COURT: All right. I appreciate the comments in that regard. I am torn as it relates to that. So I want to just get your thoughts.

Let me ask you another question. To what extent do you contend that this Court can refer to the decisions of the Japanese courts to assist this Court in interpreting the 1976 document?

MR. WEXLER: Well, we think that it would be appropriate to look at the holdings in the headings of the Court's opinions in Japan because under Japanese law claim preclusion is recognized.

We don't think it's appropriate to look at the discussion in the body because Japanese courts generally do not recognize issue preclusion. There is a good faith

exception to that which we can get into in a bit more detail.

I point to the Folex Golf Industry case, the Ninth Circuit 2000 opinion which we cited in our opposition brief. That's an interesting case. It applies California law and says.

(Reading:) Under the California law of issue preclusion, if a foreign court would not afford preclusive effect to its own opinions, then the California court -- the Ninth Circuit applying California law cannot give issue -- give preclusive effect to those opinions.

Here UMC has two state law claims. It has a breach of contract claim; it has the interference claim. Those are both state law claims.

Under Folex Golf, we think there couldn't be issue preclusive effect given to what was held in anything -- it's not what was held but what was stated in the body. That's not entitled to any preclusive effect.

It's a little more interesting still when we start looking at the federal claim because the Folex court is talking about what California law is. It's not talking about what federal law is.

But under the Folex analysis, in order to

1 determine whether or not preclusive effect should be given
2 to federal law, we need to make a determination as to
3 whether or not federal courts would decline to give
4 preclusive effect to a foreign court's judgments if -- or
5 portions of a foreign court's judgments if the foreign court
6 would not give preclusive effect.
7 THE COURT: Can I ask a question. I wrote a note.
8 On the one hand, you are saying the Court should only look
9 at the headings but not the body?
10 That seems sort of -- I ask Mr. Posner, sort of --
11 you are asking, seems like, to pick and choose. Isn't
12 that -- why shouldn't I look at it in its totality?
13 MR. WEXLER: Well, we think it's an issue of -- if
14 the U.S. court is looking at whether or not preclusive
15 effect would be given to the foreign court's judgment, then
16 you look at what the foreign court's law is on that.
17 And the foreign court's law is you give claim
18 preclusive effect. We would be happy not to have any claim
19 preclusive effect either and just have everything go forward
20 again.
21 But if there is anything that's entitled any
22 preclusive effect in the Japanese court's judgment that's
23 relevant here, it's the holding that Sompote, UMC's
24 predecessor, has exclusive exploitation rights outside of
25 Japan to the works identified in the 1976 Agreement.

If there is any preclusive effect, we would ask for that be to the preclusive effect. Otherwise, we would say no preclusive effect to anything.

Certainly, once you get down into the body of the opinion, Japanese courts would generally not afford preclusive effect.

There is the good faith issue which was litigated on the 1976 Agreement. The Japanese courts applied the document of good faith to give that preclusive effect. We would say there but for the conflicting judgment issue in which the Court has already ruled on -- so we're not re-arguing this -- the Court would have a justification to apply issue preclusion to that because we know what the Japanese courts would do.

Beyond that, we don't know that the Japanese courts would give issue preclusive effect to anything in the body of the opinions as to which TPC seeks preclusive effect here.

We have opinions from our expert, Mr. Ejiri, as to why the courts wouldn't give preclusive effect to that. We have an opinion from Mr. Furuta, TPC's second Japanese law expert, that would give preclusive effect, although I think if we parse Judge Furuta's opinion, we see what he's really saying is, once the Japanese courts have decided that under the doctrine of good faith you should give preclusive

1 effect, then the Japanese courts don't have discretion not
2 to give preclusive effect; whereas, we have Mr. Ejiri saying
3 the courts -- Japanese courts have considerable discretion
4 to make that initial determination whether the doctrine of
5 good faith requires preclusive effect.
6 So I think for these purposes, we say anything
7 that's in the body of the opinion that's not entitled to
8 preclusive effect under Japanese law -- and under U.S. law,
9 the rule ought to be in the restatement of Section 481,
10 Comment C, restatement third of the Foreign Relations Law of
11 the U.S. says --
12 (Reading:) Generally, a judgment of
13 a foreign country ordinarily has no greater
14 effect in the United States than in the
15 country where the judgment was rendered.
16 And then it goes on to say there is nothing
17 precluding a U.S. court from giving effect to a foreign
18 judgment. But TPC doesn't have authority, I don't believe,
19 saying that a U.S. court is required to give effect to a
20 foreign judgment when the foreign court wouldn't give
21 effect.
22 I don't think it even has authority that says we
23 are giving effect to the foreign court's judgment when the
24 foreign court wouldn't give it effect.
25 I think the court -- back me up -- has discretion

under comity. And I think the cleanest approach here is for the court to exercise its discretion under comity and the fact that the Japanese courts probably would not afford preclusive effect to any of the issues in the body to say -- especially given the picking-and-choosing issue that the Court has pointed out, that the Court is, in its discretion, not going to give preclusive effect to --

THE COURT: But there is nothing to say that the Court can't look to these foreign judgments to aid it in interpreting the contract under Japanese law, is there?

MR. WEXLER: Well, you get judicial notice of opinions of a foreign court for purposes of what the court held, but you can't get judicial notice for anything other than that in the opinion.

So I don't think that the court can look at the rationale as -- for purposes of determining this is what Japanese law is.

I think you would have to go back to the expert opinion saying, "Here is what Japanese law is generally" rather than implicitly giving issue preclusive effect to statements by a Japanese court as to what the law is in this particular matter.

THE COURT: All right. Let me have Mr. Posner step back up. I have some questions on this 1976 Agreement from your perspective.

And, obviously, I will give you an opportunity to be heard if there is anything that you want to respond to from Mr. Wexler. But the question I have for you is did the Japanese courts -- did they define the original "Ultraman" works that UMC can distribute outside of Japan? And, if so, are they "Ultraman Q"; "Ultraman"; "Ultraman Seven"; and "Ultraman Taro," T-a-r-o?

Are they a part of the original works according to the Japanese court's interpretation of that 1976 document?

MR. POSNER: I think the answer is, yes, Your Honor. The way the, kind of, nomenclature the parties have used is to refer to -- I don't know if you happen to have a copy of the 1976 document, which I could provide you one -- it says -- it's a relatively short document. And in Article 1 of the document, there are a number of different motion pictures and films that are identified.

THE COURT: Yes.

MR. POSNER: This contract, if it was valid -- it was created in 1976. All of the works that are identified in Article 1 are the then-existing "Ultraman" works, if you will, and the parties have referred to those, and I believe the courts have referred to those as the original "Ultraman" works. The works that postdate this agreement have often been referred to as the new "Ultraman" works.

The general dispute that the parties have

1 addressed is whether the rights that are transferred under
2 this document are limited to the rights to display and to
3 distribute the original "Ultraman" works or whether the
4 rights extend also to the right to create new and derivative
5 or future "Ultraman" works.
6 That's the issue that the court decided. If you
7 have a more specific question about parsing through some of
8 these specific items in Article 1, I might not have grasped
9 that, but my general understanding is that those were the
10 works that are were at issue in that Japanese lawsuit.
11 THE COURT: 1.1 through 1.9 of Article 1.
12 MR. POSNER: Correct. Without getting in the
13 weeds, there are some distinctions between certain of those
14 works and how important they are to the clients and what the
15 parties have done with them, but I don't think those matter
16 for present purposes.
17 We refer to those as the "original works," and our
18 position is that UM Corporation's rights, as the alleged
19 assignee of Mr. Sompote, are limited to displaying and
20 distributing those original works outside of Japan, period.
21 THE COURT: All right. So then let's talk about
22 Judge Iimura's expert opinion. Okay? Looking at it in a
23 light most favorable to UMC, one could say he just walks
24 through the conclusions of the Japanese courts but it
25 doesn't really provide that much assistance in the

interpretation. So let's assume for the sake of this question that the court declined to consider his opinion.

What other evidence would you have the Court look to to support your interpretation of the 1976 document?

MR. POSNER: Well, Your Honor, I -- just to start, they don't mention Federal Rule of Civil Procedure 44.1 anywhere in their papers, and I think that issue really overlays this entire discussion.

This is a matter of determining foreign law, Japanese law here. It's a legal question, the meaning of this contract. The Court is unbound as to what it might consider to make that determination.

THE COURT: All right. I understand that. But let's say for the sake of this question, for whatever reason I just feel uncomfortable, I am squirmy because, God forbid, I would be put in the position where I would be paid to opine on something that I wrote several years earlier in my career. Is there any other evidence that you would rely on or not?

And it's okay. I understand 44.1 allows -- seems to allow a lot of discretion. But, Mr. Wexler, you know, to use an inartful phrase, he gets a queasy feeling about all this.

MR. POSNER: That's the word he used when we first disclosed him a few months ago. There absolutely is, Your

Honor.

This is a question about what did the Japanese courts hold? What is Japanese law about the meaning of the contracts?

The Japanese law is embodied in the judgments themselves. Those judgments and the translations of them are included in our request for judicial notice.

We offered the opinion of Judge Iimura to help explain and navigate, if you will, what otherwise could be difficult judgments to understand. They're translations. They're not written the same way we write our judgments. That's all he did.

And the critical fact at this point and really why the whole Judge Iimura issue is much ado about nothing is because nothing that Judge Iimura said about the meaning of the Japanese decisions is disputed.

They've agreed that he accurately described the portions of the decisions that he addressed. We included those portions in our separate statement of undisputed facts, and they have not disputed them.

So to directly answer your question, if you wanted to determine the meaning of the Japanese judgments, the Court may now look to the judgments themselves, to Judge Iimura's declaration, or to our separate statement of undisputed facts. There is no dispute what the courts held.

We think Judge Iimura's decision -- and I am happy to discuss it in more length. His declaration should be considered to the extent Your Honor thinks it's helpful to the Court. But even if not, at this point, you can go to our separate statement of undisputed facts, and his descriptions of what the Court held in relevant part, those are undisputed. There are citations that cross-reference the judgments themselves, and you could look to those as well.

THE COURT: Thank you.

I think, let's ping-pong back to Mr. Wexler, if we could.

MR. POSNER: Your Honor, I would like the opportunity to respond to some of the points Mr. Wexler made, if you think this is a good time to do it. I will try to tick them off.

There was an issue about LaSala. I wanted to -- to the extent there was any confusion, that case is about preemption and not issue preclusion, whether preemption should extend to a case governed by foreign law.

The only thing I'll say is we do have a preemption argument, but we don't get there even if the contract is interpreted the way that we believe it should be because the copyright claim and the contract claim in that case fail on their merits.

If the contract's interpreted as way we say, then there is no genuine dispute of material fact -- that we have not done anything that would have violated their contract rights or infringed their copyrights within the U.S.

The second point -- and this was -- Mr. Wexler touched on this in various ways, and it is an important issue -- what law applies to this?

Mr. Wexler referenced the Berne Convention. I think the only reference to the Berne Convention in the record comes from their expert on Japanese law who, by the way, is an M&A attorney who is admittedly not a copyright expert, but he included some guidance about how the Berne Convention applies.

You don't, we think, need to worry about that here. There are a number of authorities that are uncontroverted, and I haven't seen anything that UM Corporation has submitted that hold that, where the question is about the scope of a license and the rights of a licensee, the first thing you do is interpret the meaning of the license agreement.

And in this case, you would do that under Japanese law. There are some limitations on that that might not apply, but you certainly look to Japanese law to interpret the contract. That's precisely what the Japanese courts do.

And so UM Corporation goes to the Copyright Act

often and says, "We are an exclusive licensee. That means we necessarily have all rights under the Copyright Act, including the right to create derivative works." But that's not how it works.

You look to the contract. We are the author. We hold all the rights. We are the owner of these works. We can transfer those rights under a license agreement, and we can transfer -- we can parse out those rights as finely as we'd like. That's the divisible nature of copyright interests. And you interpret the contract to figure out exactly what rights were transferred under the contract.

And then UM Corporation, assuming it receives certain exclusive rights, it would have a copyright interest but only to the extent of the rights that were transferred to it under the contract. So it all goes back to the contract interpretation.

I don't see how the Berne Convention comes into play. It's not referenced or discussed or relied upon in the many cases that we've cited that explains the analytical way that you arrive at the scope of UM Corporation's rights.

Mr. Wexler referenced a few times an appellate court decision from 2003. We're not hiding from any of the decisions of the Japanese courts. There were two separate lawsuits in Japan each span a district court ruling, an intermediate appellate court ruling, and then the Japan

Supreme Court.

Mr. Wexler has made an issue that we might have overlooked or not relied upon one of them. Their holdings are consistent. And Mr. Wexler says, "One Court said that Mr. Sompote can exploit these "Ultraman" works outside of Japan."

Yes, that's true. The question is, though, what does "exploit" mean? And if you look at the judgments, "exploit" means he can display and distribute these original "Ultraman" works outside of Japan but he cannot create new or derivative or future work. So I don't know how that argument changes the analysis at all.

I believe we've addressed Judge Iimura. I would be happy to speak a little bit more about that.

And then I would say on the question of the preclusive effect of the Japanese judgments, related question Your Honor asked is can you even consider them to determine the meaning of foreign law? Of course.

This is Rule 4.1 for one thing. The court's task is to determine foreign law. It, frankly, is unusual here that there so happens to be these judgments that answer the question of foreign law directly. But to overlook them for some reason, I can't think of any basis to do that. Those are incredibly persuasive authority on that question.

We have a dispute in the papers about whether

Japanese preclusion law applies or federal preclusion law applies and, if so, what to do.

We think Your Honor has ample support before the court to apply federal preclusion law to this question. UM Corporation itself relied on it in the past. So you would apply federal issue preclusion law and not have to worry about these Japanese preclusion rules.

However, UM Corporation admits -- and Mr. Wexler alluded to this -- that Japanese courts have this doctrine that they call the "doctrine of good faith." It might not be the exact issue of our issue preclusion, but the result gets you to the same place. And, logically speaking, it really must exist lest Japanese judgments wouldn't be worth the paper that they're written on, and it prevents parties from coming back to the court over and over and over again, making the same arguments.

Your Honor has discretion to apply comity and issue preclusion whether under Japanese law, whether under U.S. law -- they both apply.

I will just note that the restatement provision that Mr. Wexler cited -- this is the restatement of the Foreign Relations Law of the United States Section 481, Comment C.

It expressly says:

No rule prevents a Court in the

1 United States from giving greater preclusive
2 effect to a judgment of a foreign state than
3 would be given in the Courts of that state.
4 So even if they could show that the Japanese
5 courts are not likely to apply issue preclusion so the
6 judgments that they've reached over and over again on the
7 issue of Japanese law, this Court still has discretion to do
8 so. And they've come here just simply seeking a third bite
9 at the apple on this question of Japanese law. We think
10 this would be an appropriate law of preclusion on that
11 question.
12 THE COURT: Thank you, Mr. Posner.
13 Let me ask some other questions of Mr. Wexler.
14 Shifting -- we've talked about a lot of things thus far, but
15 focusing more back to, sort of, the contract-based claims,
16 in your papers, you cite to the Ryan versus Editions Limited
17 West case for the notion that the contract-based claims
18 generally possess this extra element necessary to remove it
19 from the ambit of the Copyright Act's express preemption
20 provision.
21 But in looking at the Ryan case, it seemed to
22 focus more on a contractual fee shifting provision which the
23 Ninth Circuit said is little if anything to do with
24 copyright claims.
25 So what's the extra element here that has little

to do with the exclusive rights of the copyright?

MR. WEXLER: Your Honor, it might have been better had I flipped that cite around on page 22 of the Docket 150 where instead of saying Ryan citing the ProCD case from the Seventh Circuit, just citing that -- the ProCD case from the Seventh Circuit and then say "Cited with approval by Ryan" because that case sets forth the rule upon which we would rely that a copyright is a right against the world, a contract is a right as between two parties. That is the extra element in a contract.

And the Courts admittedly go both ways on this issue. I think that the ProCD approach is the better approach here, but I don't think it makes a whole lot of difference on this front because I -- we're going to win the preemption issue altogether based upon the fact that this is a claim under Japanese law and the Copyright Act on its face does -- provides preemption under the common law -- against rights under the common law or statutes of any state.

And that comes from the Supremacy Clause as well. It's the underlying underpinning, and the founders didn't see fit to say that our constitution would be supreme to the laws of Japan.

And even if we get past that point, we still have the third point which is that the Copyright Act does not preempt causes of action based on proper -- possible

extraterritorial infringement.

And so the damages would be duplicative anyway on the contract claim and the copyright claim. With regard to U.S. infringement, the damages are greater under the copyright claim than the contract claim; so we wouldn't be seeking to recover those damages under the contract claim in any event.

There is no preemption as to the extraterritorial infringement. Therefore, the Court wouldn't need to resolve that split as to preemption of a contract claim, what the extra element is.

THE COURT: Okay. Let me ask, sort of, related to that -- tell me again, if you could, what's your evidence under FRCP 44.1 of Japanese law regarding the breach of contract claims?

MR. WEXLER: That's Mr. Ejiri's expert report, paragraphs -- starting around 3 up to around paragraph 51. Some of that goes to the Bandai Noncontravention Agreement. A lot of it goes to the interpretation of the 1976 Agreement.

And if the Court doesn't consider Judge Iimura's expert report -- there is not a whole lot rebutting it. There is some stuff from Mr. Furuta that rebuts it, as we pointed out, evidentiary objections. Mr. Furuta has offered some opinions there -- maybe paragraphs 20 through 24. I

wouldn't swear to that -- that were not in his expert report previously. We didn't get to depose him on that, and they didn't show up until his Reply Declaration.

So it's probably not appropriate for him to be submitting law on that point. But certainly Mr. Ejiri goes through and explains the way Japanese contract law works.

There is not -- not that dissimilar from U.S. contract law. You are trying to figure out what the intent of the parties is based upon what the contracts say or -- you are trying not to render language superfluous.

The argument we have is the Article 3 includes among the rights conveyed by the -- in the scope of license, copyright. The Japanese court held TPC is arguing that there is other rights within copyright that are mentioned elsewhere in Article 3, and, therefore, you should, basically, read the term "copyright" out of Article 3, find the parties didn't intend that.

Our view is there is a belt-and-suspenders approach taken by parties who negotiated, apparently, not attorneys and to say that rights that are copyright were not conveyed, reading copyright out of this is -- taking the belt-and-suspenders approach and saying you get neither belt nor suspenders when it's obvious that both were intended.

THE COURT: Somewhat related question. In your Complaint, I believe you allege that TPC's conduct was

within the U.S. But in response to their motion for summary judgment on the breach of contract claim, I think you allege that the Copyright Act doesn't apply to TPC's extraterritorial conduct.

So what is the extraterritorial conduct that's in dispute here? I had trouble figuring that out versus what was the conduct that occurred here in the U.S.

MR. WEXLER: I appreciate that. We had a 25-page limit stuffed to the gills; so we didn't provide as much background as we perhaps should have.

The conduct within the U.S. is the subject of the copyright claim or sales within the U.S. The extraterritorial conduct are sales of product outside the U.S., not including Japan because the 1976 Agreement conveys rights in Japan, not including Thailand because there have been adverse ruling as to Thailand but including the rest of the world of work that infringes our client's right to distribute the works.

The works identified in Article 1 of the 1976 Agreement, in response to a question you asked Mr. Posner, it's not just the six works that are identified as "Ultraman" works.

There is the two movies in 1.1 and 1.2, and there is "Jamborg Ace," another show, in 1.9 and plus those six works.

1 That's what the claim is there, and then there is
2 going to be a dispute as -- we argue the rights go beyond
3 those specific works but also to works that are the --
4 violate our client's rights, exclusive rights, to these
5 works.
6 And so there is some "Ultraman" works out there
7 that, in fact, Tsuburaya itself has said, "Well, these
8 include elements -- characters from the works covered by the
9 1976 Agreement.
10 3.7 of the 1976 Agreement applies to reproduction
11 of all models and characters used in production of the
12 films -- mention Article 1 under the original character by
13 any material in any form for commercial purposes.
14 And so we are arguing that that's a breach, that
15 this conveys the rights with regard to those characters by
16 any material and in any form. So other "Ultraman"
17 television shows or movies released outside of Japan or
18 Thailand that depict those characters or -- appears to be
19 the same character even if he got an extra stripe down the
20 side or something like that. We consider that to be a
21 violation under the contract.
22 THE COURT: Is there evidence of those uses in the
23 papers? I know you said you were stuffed to the gills, but
24 do you submit -- I just want to know where to look of
25 evidence of those other additional uses.

MR. WEXLER: No, we did not -- they didn't move on the issue of infringement, and so we did not respond with substantial similarity evidence.

Under Celotex -- and my law review case comment was Celotex because all the good cases were taken, but it turned out -- Anderson and Celotex turned out to be pretty good down the road. But under Celotex, they had the burden of pointing the evidence and saying, "Look. There is no substantial similarity" before we started introducing that evidence, and so we didn't do that.

THE COURT: All right. Fair enough.

Let's talk about Mr. Ejiri again. So he indicates that the governing law for the contract is Japanese law. Do you dispute, then, the Japanese court's interpretation of the contract under Japanese law?

MR. WEXLER: We do, Your Honor.

THE COURT: And in what way did the Japanese court err?

MR. WEXLER: And this ties into the doctrine of good faith as well because, as Mr. Ejiri shows, Japanese courts don't need a very strong reason to revisit things.

The way the Japanese system is set up, unlike the U.S. system, is they think doing it over again isn't as much of a burden as the U.S. courts think it is.

If you show that there is something different that

wasn't considered, the Japanese courts are willing to consider that.

But Mr. Ejiri points out in his declaration in some detail is that the Japanese courts were relying upon an interpretation of the 1976 Agreement that translated -- this is an agreement that was originally in English. So we're in a better position than Japanese courts are to read it in the first instance.

The term "reproduction" is used in 3.3, and "reproduction" as used in 3.7 were both translated to mean the term of art that's in the Japanese Copyright Act. I want to say it's (speaking Japanese) -- probably have that wrong and probably mispronouncing it, but I think that's what it is. And, therefore, the Japanese courts saw that term that was used and naturally interpreted that term to have the meaning in both 3.4 and 3.7 to be limited to that work of art, that term of art.

Here, as Mr. Ejiri shows, that term must have a different meaning in 3.7 rather than 3.4. Japanese courts have not considered that issue yet. We think this Court can consider this issue again even though the Japanese courts ruled on it, although I think the easier argument is the term "copyright" being in 3.4 by itself.

THE COURT: I struggle with this because what's the purpose of having this Court reinterpret a contract that

applies Japanese law when the Japanese court has already done so? Why should -- I mean, I would hope you would -- why should I be in the position to do that when you have got a court that's already done that?

MR. WEXLER: Well, the Court, of course, has discretion on this front. I point out that TPC has relitigated issues again and again in China, in Thailand, and Japan with regard to the validity of the 1976 Agreement notwithstanding a ruling from Japanese court saying that the 1976 Agreement was valid.

And I think that depended just as much on Japanese law as the interpretation of the 1976 Agreement. TPC is choosing to relitigate that issue over and over. I don't think that it should get to pick and choose, that -- it's going to stand by one holding, and this Court is, unlike the Chinese courts or Thai courts in particular which not only looked at that issue again but actually held Sompote, UMC's predecessor, criminally liable. And they keep litigating these issues over and over again.

It's kind of a notion of clean hands as far as TPC is coming in and asking the Court to stand by some holdings of the Court. Having challenged a lot of the other holdings of the Court, this Court should feel more free to look at the issues.

I understand the Court's temptation where an issue

has been decided by the Japanese court previously to stand by that holding. Frankly, if UMC had won on its motion to have the Japanese court's holding as to the authenticity of the 1976 Agreement, have that one upheld, I think I would be in a far weaker position arguing this than I am now. Basically, I think the baby in the bath water have all been thrown out, the Court hot hand up -- looking at it again.

THE COURT: This is very helpful to me. As you can tell, there are a lot of issues that come up from reviewing all these documents.

If we could shift for a moment to the copyright infringement piece of this, I just want to hear you articulate what's the evidence that TPC published the original works, according to either parties' definition, quite frankly, outside of Japan?

MR. WEXLER: No evidence introduced on this motion during the period of the statute of limitations. There is three works as to which there is no evidence one way or the other.

But our claim for -- those are probably relatively minimal to the extent they happened, and we didn't introduce contrary evidence on that.

The infringement claim is based upon substantial similarity of these "Ultraman" works. And Kei Minamitani's declaration lists 30 or so new "Ultraman" works occurring

after the time of the 1976 Agreement.

There are quite a few of those. If you show those to the finder of fact, they are going to look at original "Ultraman" work. They're going to look at one of these new works. They're going to find substantial similarity, not evidence we introduced because we didn't need to under Celotex, but that is the nub of this.

And if the Court were to find that the claim for copyright infringement was limited to these specific works and not -- doesn't cover substantially similar works, then UMC would not have damages on an infringement claim.

I would point out, however, that the Berne Convention, which is mentioned at page 14 of our opposition -- once you get the holding by the Japanese court of appeal -- or once the Court revisits the issue and finds that there is exclusive exploitation rights outside of Japan that were held by Sompote or if the Court finds, looking at this anew, that copyright is transferred, then you get into the substantial similarity inquiry and get into infringement.

THE COURT: Got it. That's very helpful.

I think those were all the questions that I have for you right now.

Mr. Posner, why don't you step to the lectern and see if there is anything you wish to say in response. Just

give me one moment. I want to go through some of my other notes. I want to make sure I don't miss anything while I have you all here.

Go ahead, Mr. Posner, if there is anything you want to say in response.

MR. POSNER: Sure. Thank you, Your Honor.

Mr. Ejiri is an expert on Japanese law, and he has offered at best an alternative interpretation of what the contract means under Japanese law.

There is no genuine dispute of material fact about what the contract means, and Mr. Ejiri's opinion under Rule 44.1 does not create a genuine dispute of material fact. This is an issue of Japanese law for the Court to decide. And on that question whether it's comity, issue preclusion, following the judgments, there is no better source to look to than those Japanese judgments.

Mr. Ejiri admits that he is just proffering an interpretation of the contract under Japanese law that is different from every other court to have address the issue.

And Mr. Wexler suggests that there is some new argument that they should have the opportunity to make.

First, we've showed that under Japanese preclusion law, certainly under U.S. preclusion law, you don't get an opportunity just to make a new argument especially after 20 years of litigation on an issue. Issue preclusion applies

to the resolution and the determination of an issue, and the issue that was decided is the meaning of the contract.

So whether or not they have a new argument really is irrelevant. This is a one-page contract that was subject to extensive litigation for more than a decade in Japan.

Every issue, every term has been decided. The question about the meaning of certain terms, those have been addressed. We show that in our papers. The court interpreted the word "reproduction" in accordance with the Copyright Act in Japan, which is a reasonable way to do it. The court interpreted the same way in Section 3.7.

Mr. Wexler suggests -- and they say this in their papers -- that there is a translation error which suggests something went wrong or there was a mistake. It's not a translation error. It's the way the court interpreted the contract in Japan.

They said this is what reproduction means, and now UM Corporation wants to come here and doesn't have a lot to work with, frankly, after so many decades of litigation, and so they say this word should be interpreted differently.

There is no basis to do that. And to get into the contract just a little bit before I go, the word "reproduction" is used twice in Sections 3.3 and 3.7, and for that reason, Mr. Ejiri, their expert, says you must give it a different meaning in each place.

He says it refers to the same license rights; it would be surplus if you didn't do it that way. But that's not the case. This is explained in detail in our papers. The first use of the word "reproduction" in 3.3 refers reasonably to the right to reproduce the works to distribute them.

The second use of the word "reproduction" in 3.7 is a very specific and limited right to reproduce the models and characters in those works under the original character by any material and in any form for commercial purposes.

Their own expert acknowledged, quite reasonably, that this provision refers to making things like toys. It doesn't refer to making new and derivative motion pictures. It's not referring to the same license rights. You can treat the word "reproduction" the same way in both places.

Just to make one other point, their other avenue, the other avenue that they try to get to the right to make derivative works, which is another argument that was squarely raised and rejected by the courts in Japan, is that the inclusion of this word "copyright" in 3.4 must necessarily mean that they are the recipient, that they received a transfer of every one of the divisible rights under copyright.

But that's not how it works. A licensed right is assumed to remain with the author or the owner under both

Japanese and U.S. law unless there is a clear and unequivocal transfer of that right.

Here you can tell -- this is what the courts have held -- that the word "copyright" in here was not intended to refer to the transfer of every single right under copyright because the contract proceeds to identify specific rights under copyright that are being transferred, and it doesn't include every right.

And in 3.7, it refers to the very specific right to make toys based on certain characters. If the word "copyright" in itself refers to the right to make -- have every single right under copyright, then 3.7 would be entirely unnecessary because they would have already had that right.

I refer Your Honor to the Creazioni case that we cite -- I don't know if I'm saying that correctly. It's a recent case from the Southern District of New York that is very similar in a lot of ways.

It interpreted a license agreement under Italian law to determine whether the rights to create derivative works were transferred, and it determined that they were not transferred and, therefore, the plaintiff had no right to sue for an allegedly infringing derivative work.

And the court specifically noted there that the license that -- there was an argument that there was a

reference to the transfer of all rights; so, therefore, that must necessarily mean every right under copyright, but the court said, "That doesn't make sense because there is a specific transfer of a very certain way that you are allowed to use these works. And if the use of 'all rights' meant you have every single right under copyright, then that specific transfer would have been unnecessary."

So for those reasons, the word "copyright" should not be interpreted as including every single right under copyright. That's what the Japanese courts held.

So there is no dispute of material fact here. This is a question of Japanese law. We encourage Your Honor -- we think there is ample basis to end this dispute about the meaning of the contract either as comity in issue preclusion or simply by applying Japanese law as it's set forth in the judgments.

THE COURT: Thank you.

Mr. Wexler, I have another question that I want to make sure I heard from you on.

If I understand your briefs -- on both sides the briefing was very well done -- you seem to argue extensively that UM Corporation is an exclusive licensee of the original "Ultraman" works and that an exclusive licensee under U.S. copyright constitutes -- therefore, constitutes a -- I think the phrase you use is a "transfer" of copyright ownership

which would, therefore, give UM Corp. the rights to the derivative works.

And the question that came to my mind is does that, sort of, for lack of a better term, create a moving target in the sense that you are trying to import the Japanese court's finding that that 1976 Agreement constitutes an exclusive license outside of Japan and apply that label to U.S. copyright law to claim rights to these derivative works?

But isn't the first part of the question really, sort of, what rights you own, which is -- if I am following this and understanding correctly, isn't that governed by Japanese law, and then the second question is whether TPC infringed on those rights transferred under Japanese law?

So am I missing something in the argument or in my analysis of it?

MR. WEXLER: Well, infringement is certainly under U.S. law under the Berne Convention. Page 14 of our brief where we cite Itar-Tass and Murray -- incidentally, Footnote 18 explains why Creazioni is inapplicable. That's kind of a twofer on that page.

Once -- you have the two separate issues. Once is -- the first issue is ownership of the copyrights determined under Japanese law.

Second issue is infringement of the copyright's

1 determined under U.S. law. There is a little bit of a gray
2 area as far as the scope of the rights conveyed. It's the
3 authorities -- some of them put it into the foreign law
4 component. Some of them put it into the domestic law, the
5 U.S. law component.
6 But our argument -- and I don't think there is any
7 inconsistency here -- is you look at Japanese law to
8 determine what rights are conveyed. We have the Japanese
9 court of appeal opinion that says it's exclusive
10 exploitation rights outside of Japan.
11 We have the 1976 Agreement, if the Court looks at
12 the issue again, which says "copyright." And that on its
13 face is -- everything -- every strand of copyright is
14 incorporated within that.
15 I think, if the Court were construing this as a
16 matter of first impression, it would be very reluctant to
17 find that the 1976 Agreement does not convey copyright.
18 There is other provisions that convey certain portions of
19 copyright.
20 You are relying upon the maxim about not rendering
21 a provision superfluous. Reading it the way that TPC wants
22 to have it read would render the term "copyright"
23 superfluous.
24 I think you read "copyright" to mean everything.
25 I wouldn't look at it in terms of ownership of a copyright

rather than an exclusive license of a copyright, but for purposes of the U.S. law, it's the same thing -- exclusive licensee of a copyright holds all of the rights under the copyright including the right to make derivative works sue for infringement and all that.

That is the way we are dividing up the choice of law: Japan, creation of rights; U.S., infringement of rights.

THE COURT: Thank you. I appreciate it.

I think I have asked a lot of questions. I appreciate the time and effort both parties have put into this. I will be honest with you. It will take some time before the Court issues a ruling on this case. In the meantime, the matter will remain under submission until the Court issues a ruling.

But thank you all. Excellent briefing, excellent argument today. I appreciate it. Thank you.

MR. WEXLER: Thank you. We appreciate all the time and effort that you and your staff have put into this, speaking for both sides.

MR. POSNER: So do we.

THE COURT: All right.

(Proceedings concluded at 1:10 P.M.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: September 14, 2017.

/S/ CHIA MEI JUI

Chia Mei Jui, CSR No. 3287

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